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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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Ex parte J.M.S.

PETITION FOR WRIT OF MANDAMUS

(In re: G.C.S.

v.

J.M.S. and S.T.S.)

(Cullman Juvenile Court, JU-19-650.01)

EDWARDS, Judge.

J.M.S. ("the mother") and S.T.S. ("the father") are the divorced parents of H.L.S. ("the child"). The mother and the

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father are involved in a divorce action in the Cullman Circuit Court ("the circuit court"); pursuant to a July 2017 order entered in that action, the parties were awarded joint custody of the child, pendente lite.

On November 25, 2019, G.C.S. ("the paternal grandmother"), acting pro se, filed a dependency petition and an emergency motion in the Cullman Juvenile Court ("the juvenile court"), alleging that the child had been living with her, her husband, and the father; that the father had entered the hospital for treatment of leukemia; that the mother has a substance-abuse problem; that the mother had not been exercising her right to joint custody under the pendente lite order entered in the divorce action; that the mother had, in May 2018, threatened the child and "tore up [the] house"; and that the child did not want to be with the mother because of her fear that the mother would exhibit similar behavior. The dependency petition also made reference to a June 2019 hearing and a resulting agreement between the parties that permitted the mother to have supervised visitation with the child only on Sundays. The paternal grandmother sought an emergency award of custody of the child.

The juvenile court set the paternal grandmother's petition for a hearing to be held on December 2, 2019. After that hearing, the juvenile court entered the following order:

"This action came to be heard on the Custody Petition filed by [the paternal grandmother]. The mother ... ha[s] not been served and [the] father[,] ... [although] having not been served[,] ... consent[ed for] temporary custody to be granted to the paternal grandmother.

"The Court finds the child dependent and awards Legal and Physical Custody of the minor child to [the paternal grandmother] and she is granted the authority to sign for travel by said child, both in and out of the State; [to] sign for admission into and dismissal from hospitals, for anesthesia, surgery, and other medical procedures by a licensed physician; and shall have the authority to enroll said minor child in school or day care, under the provisions of law in such cases made.

"Case shall be set for review on January 30, 2020, at 9:30 a.m."¹

On December 3, 2019, the mother filed a motion to dismiss the paternal grandmother's dependency action. In that motion, the mother attacked the paternal grandmother's allegations as untrue and alleged that the paternal grandmother had concealed the existence of the circuit court's pendente lite order from

¹No party has informed this court whether the January 30, 2020, hearing was held or, if it was held, whether its outcome might impact the ripeness of the mandamus petition. Thus, we presume that the hearing, if it was held, did not render the mother's mandamus petition moot.

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the juvenile court. She further contended that she had been deprived of due process and that the juvenile court lacked jurisdiction to enter a custody order regarding the child because of the pending divorce action in the circuit court. The materials before us do not reveal whether the juvenile court acted on the mother's motion.

On December 23, 2019, the mother filed a petition for the writ of mandamus in this court. In that petition, she sets forth her issues as: (1) whether the juvenile court lacked subject-matter jurisdiction over the paternal grandmother's action and (2) whether the juvenile court abused its discretion in modifying custody without a hearing and "without sufficient proof." Because the mother alleges a lack of subject-matter jurisdiction and challenges the entry of the December 2, 2019, order on due-process grounds, this court overlooked the untimeliness of the mother's petition, which was filed outside the presumptively reasonable time for filing the petition, see Rule 21, Ala. R. App. P. (establishing the presumptively reasonable time for filing a petition for the writ of mandamus as equivalent to the period for filing a notice of appeal), or more than 14 days after the entry of the

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juvenile court's order. See Ex parte K.R., 210 So. 3d 1106, 1112 (Ala. 2016) (holding that an appellate court may consider an otherwise untimely petition for the writ of mandamus when the argument asserted goes to the jurisdiction of the trial court to enter its order); Ex parte Madison Cty. Dep't of Human Res., 261 So. 3d 381, 385 (Ala. Civ. App. 2017) ("[A] petition for the writ of mandamus that challenges the jurisdiction of the trial court to enter the order sought to be vacated need not be filed within the presumptively reasonable period prescribed by Rule 21."); Ex parte M.F.B., 228 So. 3d 460, 462 (Ala. Civ. App. 2017) (including petitions in which a party asserts a due-process violation as being encompassed in the holding of Ex parte K.R.). We called for answers to the petition, but none were received. As a result, we consider the factual averments in the mother's petition to be true. See Ex parte Breslow, 259 So. 3d 673, 674 n.1 (Ala. Civ. App. 2018) ("This court called for answers to the petition but received none; thus, we accept as true the averments in the mother's mandamus petition.").

"'A writ of mandamus is an extraordinary remedy ... that should be granted only if the trial court clearly abused its discretion by acting in an arbitrary or capricious manner.' Ex parte Edwards,

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727 So. 2d 792, 794 (Ala. 1998). The petitioner must demonstrate:

""(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.""

"Ex parte Edwards, 727 So. 2d at 794 (quoting Ex parte Adams, 514 So. 2d 845, 850 (Ala. 1987))."

Ex parte D.J.B., 859 So. 2d 445, 448 (Ala. Civ. App. 2003).

By and large, the arguments in the mother's petition are underdeveloped and unsupported by appropriate authority. For example, she fails to cite any authority for her argument that the juvenile court lacks subject-matter jurisdiction over the paternal grandmother's dependency action, which argument, we presume, is based either on the pendency of the divorce action in the circuit court or on the mother's contention that "the [paternal] grandmother failed to allege facts or circumstances that would support a dependency order." Pursuant to Rule 21(a), Ala. R. App. P., a petitioner must support his or her arguments with citations to applicable authorities. Our supreme court has explained that,

"[i]f anything, the extraordinary nature of a writ of mandamus makes the Rule 21 requirement of

citation to authority even more compelling than the Rule 28(a)(10), Ala. R. App. P.,] requirement of citation to authority in a brief on appeal. Thus, [a petitioner's] failure to cite authority supporting [his or] her arguments, as required by Rule 21, provides this Court an ample basis for refusing to consider those arguments, and [his or] her petition could properly be denied on that basis."

Ex parte Showers, 812 So. 2d 277, 281 (Ala. 2001). However, as is our prerogative under Rule 28, Ala. R. App. P., we may consider underdeveloped or unsupported arguments if we are able to discern them, Kirksey v. Roberts, 613 So. 2d 352, 353 (Ala. 1993) (explaining that an appellate court may consider an argument that is not compliant with Rule 28(a)(10), Ala. R. App. P., if the court is able to adequately discern the issues presented), and we will do so here.

The allegations of the paternal grandmother's petition, which include that the father is hospitalized and unable to care for the child, that the mother has a substance-abuse problem, and that the mother engaged in behavior in the past that has caused the child to fear being in the mother's presence, are sufficient allegations to invoke the dependency jurisdiction of the juvenile court. See Ex parte S.P., 72 So. 3d 1250, 1252-53 (Ala. Civ. App. 2011) (explaining that allegations of a maternal grandmother that the mother of the

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child was deceased and that the father of the child had been abusive to the mother and suffered from mental instability were sufficient to invoke the dependency jurisdiction of a juvenile court). Moreover, neither the pendency of the divorce action nor the existence of the order of the circuit court in the divorce action prevents the juvenile court from exercising its jurisdiction over the dependency action. See A.G. v. Ka.G., 114 So. 3d 24, 26 (Ala. 2012) (explaining that, although a circuit court generally retains jurisdiction over a child-custody issue once it acquires that jurisdiction, one exception to that retention of jurisdiction is when a third party initiates a dependency action in a juvenile court); Ex parte J.C., 165 So. 3d 623 (Ala. Civ. App. 2014) (quoting B.H. v. Tuscaloosa Cty. Dep't of Human Res., 161 So. 3d 1215, 1219 (Ala. Civ. App. 2014)) ("'[A] circuit court does not retain exclusive jurisdiction over a child whose custody is addressed in a divorce judgment when a separate action is initiated in a juvenile court alleging that the child is dependent.'"). Therefore, the mother is not entitled to a writ ordering the juvenile court to dismiss the paternal grandmother's

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dependency action based upon a lack of subject-matter jurisdiction.

The mother's argument concerning the failure of the juvenile court to afford her due process is also underdeveloped and unsupported by appropriate authority. The mother relies solely on caselaw concerning the award of ex parte custody in child-custody-modification actions, see, e.g., Ex parte C.T., 154 So. 3d 149 (Ala. Civ. App. 2014), which cases are inapposite to an award of emergency or temporary custody in a dependency action.

The mother is, however, correct that the juvenile court's December 2, 2019, order, which finds that the child is a dependent child, was inappropriate under the circumstances of this case. "[An evidentiary] hearing ... is required to determine if the child is, in fact, dependent." A.G., 114 So. 3d 26. That is, a juvenile court cannot determine that a child is dependent without taking evidence establishing a basis for that conclusion. Id.; see also Ex parte J.C., 165 So. 3d at 626-27 (explaining that due process requires an evidentiary hearing before a child is declared dependent); Ex parte S.P., 72 So. 3d at 1253 ("recogniz[ing] the impropriety

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of a dependency finding in an ex parte order" and stating that "Alabama courts have long held that an evidentiary hearing ... is required in order for a juvenile court to declare a child to be dependent"). Although the juvenile court could have awarded emergency custody to the paternal grandmother in its December 2, 2019, ex parte order, see Ex parte S.P., 72 So. 3d at 1253 (construing an order declaring a child dependent and awarding temporary custody to a maternal grandmother that was entered without notice to the parent to be an ex parte temporary-custody order), the juvenile court could not have determined that the child was dependent based solely on the paternal grandmother's petition and the arguments of her counsel before the parents were even served with the petition and provided with notice and an opportunity to be heard on the paternal grandmother's petition. See Ex parte J.C., 165 So. 3d at 626-27 (agreeing that the failure of a juvenile court to hold an evidentiary hearing at which the mother could participate within 72 hours of the entry of an ex parte custody order on a dependency petition violated the mother's due-process rights and granting a petition for the writ of mandamus based upon the mother's argument that the juvenile

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court had not given her notice or held an evidentiary hearing before or immediately after depriving her of the custody of her child on an emergency basis in a dependency action). We therefore construe the December 2, 2019, order as an emergency order granting temporary custody of the child to the paternal grandmother, and we direct the juvenile court to immediately hold an evidentiary hearing at which all parties will have the opportunity to participate on the issue of the child's dependency.

PETITION DENIED IN PART AND GRANTED IN PART; WRIT ISSUED.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ.,
concur.